IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPLICATION NO.24 OF 2005

IN

COMPANY PETITION NO.103 OF 2002

1. Majid Ahmedbhai Oomerbhoy,
   of Bombay, Muslim Inhabitant,
   residing at 4th Floor,
   Sattar Sea View, 45, Chowpatty
   Sea Face, Mumbai 400 007.

2. Nadeem Majid Oomerbhoy,
   of Bombay, Muslim Inhabitant,
   residing at 4th Floor,
   Sattar Sea View, Chowpatty,
   Bombay 400 007.

3. Heena Majid Oomerbhoy,
   of Bombay, Muslim Inhabitant,
   residing at 4th Floor,
   Sattar View, Chowpatty,
   Bombay 400 007. ...Applicants

Versus

1. Rashid Sattar Oomerbhoy,
   of Bombay, Muslim Inhabitant,
   residing at 7, Noor Mansion,
   Chowpatty Sea Face,
   Bombay 400 007.

2. Imtiaz Sattar Oomerbhoy,
   of Bombay, Muslim Inhabitant,
   residing at 7, Noor Mansion,
   Chowpatty Sea Face, Bombay 400 007.

3. Afzal Sattar Oomerbhoy,
   of Bombay, Muslim Inhabitant,
   residing at flat 8, 3rd Floor,
   Court View, Maharshi Karve Road,

Bombay 400 020.

4.Salim Sattar Oomerbhoy,
of Bombay, Muslim Inhabitant,
residing at 7, Noor Mansion,
Chowpatty Sea Face, Bombay 400 007.

5.Anwar Sattar Oomerbhoy,
of Bombay, Muslim Inhabitant,
residing at Andromeda, 2nd Floor,
Flat No.2A, Worli Sea Face,
Bombay 400 025.

6.Khatija Sattar Oomerbhoy,
of Bombay, Muslim Inhabitant,
residing at 1st Floor, Sattar View,
Chowpatty, Bombay 400 007.

7.Shahida Mehmood of Mumbai,
Muslim Inhabitant, having her
Address at 1st Floor, Sattar View,
Chowpatty, Bombay 400 007.

8.M/s.Ahmed Oomerbhoy Pvt.Ltd.,
Ahmed Oomerbhoy Street,
Two Tanks, Grant Road,
Mumbai 400 008. ...Respondents

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Applicants and their Advocate absent.

Mr.Sanjay Jain with Mr.Kalpesh Joshi i/b
M.Ranchoddas & Co. for Respondent No.1.

Mr.J.P.Avasia i/b S.Mahomedbhai & Co. for
Respondent No.3.

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CORAM: A.M.KHANWILKAR, J.

JUNE 23, 2005.

ORAL JUDGMENT :

1. Heard Counsel for the parties.

2. This Company Application survives only insofar as relief claimed in terms of prayer clause (b). This is so because the property in question, as is prayed in prayer clause (a) has already been sold. Two points arise in the present Application, viz.

(1) Whether the Respondent No.3 is liable to pay any amount by way of compensation/royalty towards use of the flat situated on the third floor of Gold View Co-operative Housing Society being Flat No.8 at 126, M.K.Road, Bombay - 20?

(2) If the answer is in the affirmative, what should be the amount of compensation of the royalty to be recovered from the Respondent No.3 for the user of the said flat till 11th April 2005?

3. According to the Applicants, the

Respondent No.3 is liable to pay compensation for use and occupation of the said flat at least from the date of filing of the Company Petition on 5th September 2001 till the date of sale of the flat or the same was vacated by the Respondent No.3 in terms of Clause 15 of the Minutes of Order dated 27th February 2003. The Application is contested by Respondent No.3. Respondent No.1 is supporting this Application.

4. None appears for the Applicants when the matter is called out. Ordinarily, I would have preferred to dismiss the Application on the ground of default. However, I find substance in the plea taken on behalf of Respondent No.1 that the relief as claimed in the Application, which survives for consideration, if accepted, would enure to the benefit of the Company, for which reason, even if Applicants are not represented, the question raised in the Application be decided at the instance of Respondent No.1.

5. Accordingly, matter was heard at length, when Counsel for the Respondent No.1 addressed the

Court in support of the relief in terms of prayer clause (b). The Application is resisted by the Counsel for the Respondent No.3. According to the Respondent No.1, the Respondent No.3 is liable to pay compensation/royalty for the user of the disputed premises from 5th September 2001 on the institution of the Company Petition till the same was vacated, and this issue will have to be answered against the Respondent No.3, as the Respondent No.3 has been put to notice about such liability, not only because of institution of the Company Petition, but in any case, on institution of the Company Application on 17th November 2003 and on passing of the order dated 27th February 2003, which expressly keeps the issue regarding recovery of compensation/royalty from the Respondent No.3 open.

6. To answer this question, in my opinion, as rightly contended by the Respondent No.3, the Court will have to first examine the status of the Respondent No.3. The material on record clearly indicates that the Respondent No.3 was using the disputed premises in the capacity of Director of

the Company in liquidation. It also appears that he along with his family was allowed to occupy the disputed premises on gratuitous licence basis by the Company. No charges were recovered from Respondent No.3 for the user of the disputed premises for his residential use.

7. The next question is: whether on the institution of the Company Petition, the status of Respondent No.3 and the arrangement which prevailed between the parties till then, automatically came to an end? The answer in my view, has to be in the negative. Counsel for the Respondent No.3 has rightly contended that the Respondent No.3 continued to be Director of the Company, irrespective of institution of the Company Petition on 5th September 2001 or for that matter, on passing of the order on 27th February 2003. That is because of the purport of Section 491 as well as Section 495 of the Companies Act. On conjoint reading of the said provisions, it is clear that the Respondent No.3, as Director, would continue and he would cease to be so, only upon passing of the winding up order in respect of the Company in

liquidation. It is not in dispute that there is no final order of winding up passed so far, on the Petition; which means that even now, the Respondent No.3 continues to be the Director of the Company.

8. The Respondent No.3 has rightly placed reliance on the decision of the Madras High Court reported in **AIR (29) 1942 Mad. 702 in re Rangai Goundan**, which has had occasion to consider this aspect. It has observed that Director does not cease to be Director when liquidator is appointed. Reliance is also placed on the decision in the case of **Stead, Hazel & Co. v. Cooper reported in 1933 Company Cases 428.** At page 431, it is observed that the position of a Liquidator appointed by the Court is not the same as that of a Receiver and Manager appointed by the Court. It is further observed that the Official Liquidator takes over the control of the assets of the Company and is expected to carry on the contracts of the Company for and in the interest of the Company.

9. As this is the legal position, it

necessarily follows that merely with the appointment of provisional liquidator or institution of the Company Petition or any order passed therein, the Respondent No.3 would not cease to be the Director. As the Respondent No.3 continues to be the Director of the Company, the same arrangement for occupation of the premises ought to prevail, until it is expressly terminated between the parties. To get over this position, Counsel for the Respondent No.1 contends that passing of the order on 27th February 2003 was plainly indicative of determination of the arrangement between the parties, which obtained prior to the passing of the order. In any case, the arrangement stood determined from the filing of the present Application viz. on 17th January 2003, as it expressly proceeds on that basis, so as to seek relief in terms of prayer (b).

10. I see no substance in this argument. Indeed, clause 15 of the Minutes of Order dated 27th February 2003 has left the question regarding payment of compensation and royalty in respect of the disputed premises open, to be decided at the

appropriate trial. However, there is nothing to indicate in this order that the arrangement between the Respondent No.3 and the Company regarding the user of premises has been expressly determined or altered in any manner. As mentioned earlier, the Company Petition is still pending final consideration. For making Respondent No.3 liable to pay compensation, it has to be shown that the initial entry of Respondent No.3 was unauthorised or that, if it was authorised, the arrangement on the basis of which, the Respondent No.3 entered into possession has been determined between the parties. There is nothing on record to indicate that said arrangement was brought to an end expressly by the parties. The Official Liquidator who is supposed to be the agent of the Company, has not even remotely suggested to the Respondent No.3 in that behalf. Mere filing of the Application by another person, party to the proceedings though, is not determination of the arrangement because the Respondent No.3, who is none other than the Director of the Company and whose status continues to be so by operation of law, so as to continue to occupy the premises in that capacity, which he was

entitled to in law on the same terms as prevailed before. In other words, although the order dated 27th February 2003 has left the question regarding liability to pay compensation by the Respondent No.3 for the user of premises open, that does not mean that there was express determination of the arrangement between the Respondent No.3 and the Company. Even filing of subject Application by the Applicants herein does not result in determination of arrangement between the Respondent No.3 and the Company. So understood, the Respondent No.3 was entitled to enjoy the premises on the same terms as prevailed before the filing of the Company Petition or the passing of the order dated 27th February 2003 or the filing of the present Application.

11. Be that as it may, the Counsel for the Respondent No.3 rightly relies on the observations made by the Apex Court in the case of **Anthony C.Leo vs. Nandlal Bal Krishnan reported in AIR 1997 SC 173**. In Para 34 of the said decision, the Apex Court has observed thus :

"It, however, should be made clear that if

> for the purpose of deciding the dispute of unauthorised and illegal activity affecting maintenance and preservation of the property in custodia legis it becomes necessary to determine any right claimed under a statute or flowing from some action inter parte as may be pleaded and required to be decided, it is only desirable that the Court would refrain from such determination in the summary proceeding initiated before it on the complaint of the receiver or a party to the suit and the Court will direct the receiver to seek adjudication of the dispute before a competent Court by bringing appropriate legal action. Save as aforesaid, it will not be correct to contend that in no case the Court exercising control and supervision of the property in suit by appointing a receiver will be incompetent even to pass direction against a third party for the purpose of preservation of the property, once such third party pleads defence in justification of his action. The question of summary adjudication by the Court appointing the receiver or relegating the receiver to a regular suit for adjudication of the dispute concerning third party will depend on the nature of dispute and the defence claimed by the third party".

12. Indeed, there is distinction between the status of the Receiver and that of the Official Liquidator. I am inclined to accept the contention raised on behalf of the Respondent No.3 that the exposition in the case of **Anthony C.Leo (supra)** that in summary proceedings, it is not open to

determine issue regarding the rights claimed flowing from some action inter parte, which is pleaded and required to be decided by the proper forum.

13. Counsel for the Respondent No.1, while this Judgment was being dictated, now points out that as per his recollection, this observation has been watered down in subsequent decision of the Apex Court. No such decision is placed before me for my consideration. Perhaps, the learned Counsel has in mind the exposition in the case of **Usha Harshadkumar Dalal vs. ORG Systems & Ors. reported in (2000) 1 SCC 742**. Indeed, this decision has distinguished the legal position stated in **Anthony C.Leo's case (supra)**. But that is on the facts of that case, wherein, on admitted facts on record, it was noticed that the first Respondent therein was inducted in the disputed premises posterior to the Court Receiver taking possession of the premises, that too, without leave of the Court. Such person can have no defence in law. In the latter decision, in Para 14, the Court has made it clear that it was not laying down a

broad proposition that in every case, the Receiver can resort to a summary proceeding.

14. Be that as it may, in my opinion, the Applicants cannot succeed against the Respondent No.3, as there is nothing on record to substantiate the Applicants' case that the Respondent No.3 was liable to pay compensation for the user of the disputed premises for the relevant period. It is matter of record that the Respondent No.3 has vacated the premises in terms of the arrangement directed in order dated 27th February 2003. There is no dispute with regard to that fact.

15. Accordingly, this Company Application should fail insofar as prayer clause (b) is concerned. Ordered accordingly. No order as to costs.

A.M.KHANWILKAR, J.